ORDERED.

Dated: September 30, 2022

Tiffany P. Geyer
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re

Robert Thomas Potchen,

Debtor.

Case No. 6:22-bk-1156-TPG

Chapter 7

ORDER (I) DENYING DEBTOR'S REQUESTS TO VACATE FORECLOSURE SALE AND TO EXCUSE CREDIT COUNSELING, (II) GRANTING U.S. BANK'S REQUEST TO ANNUL THE AUTOMATIC STAY, (III) OVERRULING CREDITOR'S OBJECTION AND (IV) DISMISSING DEBTOR'S CASE

This case came on for hearing on June 2, 2022, at 2:00 p.m. upon the Debtor's "*Emergency Motion to Vacate Foreclosure Sale*" (Doc. No. 8), "*Amended Motion to Void Foreclosure Sale*" (Doc. No. 37), "*Motion in Opposition to Annulment of Automatic Stay*" (Doc. No. 51), and "*Motion to Excuse Credit Counseling Class*" (Doc. No. 40) (collectively, the "Debtor's Motions"); the "*Response to Debtor's Emergency Motion to Vacate Foreclosure Sale and Request to Validate the Foreclosure Sale Nunc Pro Tunc"* (Doc. No. 28) and "*Motion to Validate the Foreclosure Sale Nunc Pro Tunc or in the Alternative, Relief from the Automatic Stay*" (Doc. No. 43), filed by Creditor U.S. Bank National Association, as Trustee for Residential

Funding Mortgage Securities I, Inc., Mortgage Pass-Through Certificates, Series 2007-S9's ("U.S. Bank"); and Creditor Lisa Rembert's "*Objection to Debtor's Bankruptcy Proceedings*" ("Rembert's Objection") (Doc. No. 54). The hearing was attended via telephone by the pro se Debtor,[1] by Patrick Hruby on behalf of U.S. Bank, and by Rembert, also pro se. Upon consideration of the pleadings, the arguments of the Debtor, U.S. Bank, and Rembert, the law, taking judicial notice of the record in this case,[2] and being otherwise fully advised in the premises, the Debtor's Motions (Doc. Nos. 8, 37, 40, and 51) are denied, U.S. Bank's motion (Doc. No. 43) is granted, and Rembert's Objection (Doc. No. 54) is overruled without prejudice to pursue any claims she may have against the Debtor.

I. FACTUAL BACKGROUND AND SUMMARY OF PARTY POSITIONS

Over thirteen years ago, on April 9, 2009, U.S. Bank commenced foreclosure proceedings against the Debtor in the Eighteenth Judicial Circuit Court in and for Seminole County (the "State Court") as to a mortgage secured by property at 530 Julie Lane, Winter Springs, Florida 32708 (the "Property"). (Doc. No. 43 at 1-2; Doc. No. 43-6 at 63.) Over four years ago, on July 10, 2018, the Debtor executed a quit claim deed conveying the Property to his daughter, Heather Ann Watson. (Doc. No. 43-7 at 1; Doc. No. 62 at 5-6.) Subsequently, on October 29, 2018, Watson conveyed the Property to Rembert via another quit claim deed. (Doc. No. 43-7 at 4; Doc. No. 62 at 6.) Rembert apparently performed services on the Property and invested funds into the Property. (Doc. No. 62 at 5, 8.) The quit claim deed to Rembert was

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[1] The Debtor is incarcerated.

[2] A court may take judicial notice of its own records. *ITT Rayonier Inc. v. United States*, 651 F.2d 343, 345 n.2 (5th Cir. Unit B July 20, 1981). The decisions of the United States Court of Appeals for the Fifth Circuit issued on or before September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

recorded in Seminole County, Florida (Doc 43-7; Ex. G), and Rembert is listed as the owner of the Property in the Seminole County property appraiser's records. (Doc. No. 43-8; Ex. H.)

On February 24, 2022, the State Court entered a "Final Judgment of Foreclosure and Reformation of Mortgage and Quitclaim Deed" (the "Foreclosure Judgment"), in favor of U.S. Bank and against the Debtor. (Doc. No. 43-2.) In the Foreclosure Judgment, the State Court found that U.S. Bank had standing to bring the foreclosure proceeding, that U.S. Bank is owed $1,575,383.25, and set a foreclosure sale for March 29, 2022. (*Id.* at 2, 5, 9.) The State Court found that the Debtor had not made any payments as of December 1, 2008 (over thirteen years). The State Court also found that the Debtor failed to maintain property insurance and pay property taxes. (Doc. No. 43-2 at 3 ¶ g.) Further, it found that U.S. Bank had advanced over $173,000 in escrow costs on behalf of the Debtor. (Doc. No. 43-2 at 3 ¶ g.)

The Foreclosure Judgment provides that "on filing of the Certificate of Sale, Defendant's right of redemption as proscribed by Florida Statutes, Section 45.0315 shall be terminated."[3] (Doc. No. 43-2 at 9.) On March 18, 2022, the Debtor appealed the Foreclosure Judgment. (Doc. No. 43-6 at 2.) He sought a stay pending appeal, which the State Court denied on March 31, 2022. (Doc. No. 43-6 at 2.)

Meanwhile, the Debtor filed a Chapter 7 petition via U.S. Mail which was docketed with the Court on March 31, 2022. (Doc. No. 1.) However, as argued by the Debtor, under the

[3] The right of redemption entails payment by the mortgagor or the holder of any subordinate interest of the amount specified in the judgment "plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor," before the clerk files the certificate of sale or a time specified in the judgment, whichever is later. Fla. Stat. § 45.0315 (2021). Here, the Final Judgment specified the date of the filing of the Certificate of Sale as the date upon which the right of redemption would terminate.

"mailbox rule"[4] the petition is deemed to be filed on March 25, 2022, the day he tendered the petition to the prison for mailing. (Doc. No. 37 at 11.) On that same date, the Debtor emailed U.S. Banks' counsel in the foreclosure case and informed him that he had filed for bankruptcy. (Doc. No. 37 at 8-11.) The Debtor supplied U.S. Bank's counsel with a very blurry photograph of himself, purportedly with his bankruptcy paperwork, as evidence of the filing. (Doc. No. 28-4.) Unsure whether this was some sort of ruse, or whether the photograph even depicted bankruptcy paperwork (Doc. No. 28, at 4 ¶ 22), U.S. Bank did not cancel the sale, and the property was sold to Surna Construction Group, Inc. ("Surna"), as Trustee for Trust #9-3089, for $685,000 on March 29, 2022 (the "Foreclosure Sale"). (Doc. No. 43-4 at 1.) The State Court docket reflects that $685,000 plus a $10,282.50 clerk's fee was deposited into the court registry on March 29, 2022, by Surna. (Doc. No. 43-6 at 2.) The Certificate of Sale was issued that same day (Doc. No. 43-6 at 2), four days after the March 25th petition date, by virtue of the "mailbox rule."

The Debtor now seeks to void the Foreclosure Sale, arguing that: (1) it violated the automatic stay imposed by 11 U.S.C. § 362(a)(2); (2) U.S. Bank engaged in a pattern of bad faith and abuse regarding its litigation with the Debtor[5]; (3) there is no mortgage on the Property; (4)

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[4] The "prison mailbox rule" provides that "'a pro se prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing.'" *Daker v. Comm'r, Georgia Dep't of Corr.*, 820 F.3d 1278, 1286 (11th Cir. 2016) (quoting *Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009)). Unless there is contrary evidence, it is assumed that the prisoner delivered the document to prison authorities on the date that the prisoner signed it. *Id.* U.S. Bank does not oppose or dispute the application of the rule.

[5] The Court declines to determine whether U.S. Bank acted in bad faith in the State Court proceedings, as the State Court is the appropriate forum to address the conduct before it. *See generally McCone v. Exela Techs., Inc.*, No. 6:21-CV-912-CEM-DCI, 2021 WL 7501824, at *2 (M.D. Fla. Nov. 9, 2021) (denying motion to disqualify opposing counsel based on actions that occurred and were reviewed in state court proceedings).

U.S. Bank does not have standing to seek relief from the stay; and (5) he is appealing the Foreclosure Judgment. (Doc. Nos. 8, 37, 51.) U.S. Bank opposes the Debtor's request and asks the Court to validate the Foreclosure Sale nunc pro tunc, or, in the alternative, annul or otherwise relieve it from the automatic stay. (Doc. Nos. 28, 43.) U.S. Bank argues that the Debtor filed this bankruptcy case in bad faith and, moreover, that the Debtor no longer owns the Property at issue because he quitclaimed his interest to Watson long ago, who subsequently quitclaimed the Property to Rembert. (Doc. Nos. 28, 43.)

In addition to the issues regarding the Foreclosure Sale, the Debtor asks the Court to excuse the credit counseling requirement under 11 U.S.C. § 109(h) because he has a high-level understanding of economics and has taught financial management matters while in prison. (Doc. No. 40.) He also argues that he does not have access to credit counseling classes in prison. (*Id.*)

The final matter before the Court is Rembert's Objection (Doc. No. 54), in which she objects to any attempt by the Debtor to eliminate whatever he may owe her as a result of her work on the Property. (*Id.*)

II. ANALYSIS OF ISSUES AND CONCLUSIONS OF LAW

There are three primary issues before the Court: (i) whether the Foreclosure Sale violated the automatic stay, and, if so, whether there is sufficient "cause" to lift or annul the stay nunc pro tunc; (ii) whether the credit counseling requirement should be waived; and (iii) Rembert's Objection.

A. Did the Foreclosure Sale violate the automatic stay?

The Debtor argues that U.S. Bank lacks standing[6] to seek relief from, or annulment of, the automatic stay. (Doc. No. 62 at 18-22.) The Court rejects this argument. In the Foreclosure Judgment, the State Court expressly found U.S. Bank had standing to bring the foreclosure proceeding. (Doc. No. 43-2 at 2.) As such, U.S. Bank is a creditor with standing to seek annulment of the stay to permit the Foreclosure Sale to be validated nunc pro tunc. *See In re Smith*, 522 F. App'x 760, 765 (11th Cir. 2013) (creditor holding two promissory notes secured by real property had Article III standing to request relief from stay in bankruptcy court to foreclose on the property because it was a secured creditor and its interest in the property was not adequately protected).[7] In addition, the Court rejects the Debtor's argument that there is no mortgage on the Property; there is a mortgage, and the mortgage was foreclosed as demonstrated by the Foreclosure Judgment entered by the State Court. This Court will not revisit the State Court's conclusion on this issue.

As U.S. Bank has standing to request annulment of the automatic stay, the Court turns to the applicability of the stay. The applicability of the stay depends upon whether the Property was "property of the estate" in which the Debtor had a legal or equitable interest when he commenced this Chapter 7 case. 11 U.S.C. § 541(a)(1). If it was, 11 U.S.C. § 362(a) stays U.S. Bank from taking action to collect a debt against the Property, and the Foreclosure Sale is

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[6] The Debtor relied on *Buczek v. Nationstar Mortgage LLC*, No. 19-CV-1402 (JLS), 2021 WL 631281, at *5 (W.D.N.Y. Feb. 17, 2021), *reh'g denied*, No. 19-CV-1402 (JLS), 2022 WL 3030597 (W.D.N.Y. Aug. 1, 2022), and *In re Escobar*, 457 B.R. 229, 231 (Bankr. E.D.N.Y. 2011). (Doc. No. 62 at 19-22.) In both cases, the courts applied New York law to find that the creditors had standing to seek relief from the automatic stay. *Buczek*, No. 19-CV-1402 (JLS), 2021 WL 631281, at *5; *In re Escobar*, 457 B.R. at 231. Thus, neither case is helpful to the Debtor's position.

[7] In the Eleventh Circuit, "Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2.

void. *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1309 (11th Cir. 1982) ("Actions taken in violation of the automatic stay are void and without effect."). The term "property of the estate" is construed broadly. *In re Bracewell*, 454 F.3d 1234, 1237 (11th Cir. 2006); *In re Holywell Corp.,* 913 F.2d 873, 881 (11th Cir. 1990); *Matter of First Dade Corp.*, 17 B.R. 887, 890 (Bankr. M.D. Fla. 1982) ("[E]verything in which the Debtor has a cognizable legal or equitable interest as of the date of the commencement of the case is 'property of the estate.'").

Here, it is undisputed that the Debtor transferred his interest in the Property to his daughter on July 10, 2018 (Doc. No. 43-7 at 1; Doc. No. 62 at 5-6), who then quitclaimed the Property to Rembert (Doc. No. 62 at 5-6). At the hearing, the Debtor freely admitted to transferring the Property and made no argument that the quit claim deed to his daughter, or the subsequent quit claim deed to Rembert, were forgeries or otherwise void. "[A] quit claim deed is 'a deed of conveyance operating by way of release intended to pass any title, interest or claim which the grantor may have in the premises but not professing that such title is valid nor containing any warranty or covenants for title.'" *Pierson v. Bill*, 182 So. 631, 634, *adhered to,* 184 So. 124 (Fla. 1938) (citing Black's Law Dictionary). In sum, a quitclaim deed operates to transfer any title, interest, or claim the grantor has to the grantee at the time the deed was made. *Morris v. Osteen*, 948 So. 2d 821, 824 n.1 (Fla. 5th DCA 2007); *Zurstrassen v. Stonier*, 786 So. 2d 65, 70 n.2 (Fla. 4th DCA 2001) (quitclaim deed conveys whatever title the grantor has and provides no warranties of the validity of title). As such, the Court finds the Debtor no longer has any legal interest in the Property subject to the protection of the automatic stay.

Because the Debtor transferred any title, interest, or claim he may have to the Property long ago, the only remaining interest the Debtor *may* have held on the Petition Date was an equitable right of redemption. Per the Foreclosure Judgment, upon the filing of the Certificate of

Sale, the Debtor's right of redemption terminated. (Doc. No. 43-2 at 9.) But the Certificate of Sale issued four days post-petition. (Doc. No. 37 at 11; Doc. No. 43-6 at 2.) So, arguably the Debtor did have a right to redeem the Property on the petition date which was subject to the protections of the automatic stay.

However, the Debtor manifested no true intent to redeem the Property, nor does the Debtor have the means to redeem the Property.[8] The Property is heavily encumbered.[9] As reflected on his Schedule I (Doc. No. 1 at 22-23) and his Chapter 7 Means Test Calculation (Doc. No. 12 at 15), he has no income. His other schedules reflect no cash assets or property that could be sold to exercise the right of redemption. (Doc. No. 1-1 at 11-20.) Most tellingly, his Statement of Intention reflects that he intends to keep the Property not through redemption or reaffirmation, but rather "based upon appeal filed with 5th DCA Case #5D22-0682." (Doc. No. 1-1 at 41.) Although the Court finds that the Debtor had no true intention and no ability to exercise any right of redemption, arguably the automatic stay did apply to protect this right.

Regardless, "[t]he Eleventh Circuit Court of Appeals has long recognized that bankruptcy courts may annul the automatic stay in appropriate circumstances in order to grant retroactive relief from the automatic stay to validate a postpetition foreclosure sale." *In re Rivera*, No. 9:15-

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[8] Moreover, the right of redemption may have passed to the Chapter 7 trustee. *In re Ruespin Corp.*, 85 B.R. 630, 632 (Bankr. S.D. Fla. 1988) (only the trustee in Chapter 7 proceeding, and not the debtor, may exercise right of redemption where petition was filed after the right to redemption arose); *Matter of First Dade Corp.*, 17 B.R. 887, 890 (Bankr. M.D. Fla. 1982) (finding that because the right to redeem the property was still in force at the time the petition was filed, the right became property of the estate). However, on May 16, 2022, the Chapter 7 Trustee filed a report of no distribution and an abandonment of assets, passing any possible right of redemption back to the Debtor. (Doc. No. 50.)

[9] The Debtor lists the Property on his Schedule A and values the property at $1.5 million. (Doc. No. 1 at 11.) He lists three secured claims encumbering the Property: a U.S. Bank claim of $1,575,130.19, a Regions Bank claim of $257,000, and an HOA claim of $5,500. (Doc. No. 1-1 at 21-22.) The Debtor also lists both the IRS and Rembert as potential secured creditors with liens on the Property. (Doc. No. 1-1 at 22.)

BK-08721-FMD, 2016 WL 513900, at *3 (Bankr. M.D. Fla. Feb. 9, 2016)); *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984) (Section "362(d) expressly grants bankruptcy courts the option, in fashioning appropriate relief, of 'annulling' the automatic stay, in addition to merely 'terminating' it."); *In re Williford*, 294 F. App'x 518, 521 (11th Cir. 2008) ("Pursuant to § 362(d)(1) . . . and after notice and a hearing, the bankruptcy court may annul the automatic stay 'for cause.' An annulment operates retroactively to validate actions taken after the petition for bankruptcy was filed.") (citing *In re Albany Partners, Ltd.,* 749 F.2d 670, 675 (11th Cir.1984)); *E. Refractories Co. v. Forty Eight Insulations, Inc.,* 157 F.3d 169, 172 (2d Cir.1998) (order annulling stay has a "retroactive effect, and thereby reaches back in time to validate proceedings or actions that would otherwise be deemed void *ab initio.*"). Annulment is awarded only in limited circumstances on a case-by-case basis, after a factual analysis. *In re Barr*, 318 B.R. 592, 598-99 (Bankr. M.D. Fla. 2004).

When evaluating whether to annul the stay, courts consider several factors, including whether: (1) the creditor had actual or constructive knowledge of the bankruptcy filing, (2) the debtor acted in bad faith, (3) grounds would have existed for modification of the stay if a motion had been filed before the violation, (4) denying retroactive relief would result in unnecessary expense to the creditor, and (5) whether the creditor detrimentally changed its position on the basis of the action taken. *Id.* In cases where a creditor seeks to annul the stay to validate a post-petition foreclosure sale, courts have also considered whether there is equity in the property of the estate, whether the property is necessary to an effective reorganization, whether the creditor promptly sought to lift the stay retroactively to obtain approval of the sale, and the intervening rights of a third-party purchaser. *In re Batton*, 308 B.R. 406, 410 (Bankr. W.D. Mo. 2004). The Court examines each factor below.

1. U.S. Bank had knowledge of the Debtor's bankruptcy filing.

U.S. Bank does not dispute that it received a communication from the Debtor in which the Debtor informed it he had filed bankruptcy. However, possibly because the Debtor was incarcerated and possibly due to the grainy nature of the photograph the Debtor supplied as evidence of his bankruptcy filing as well as other alleged gamesmanship of which U.S. Bank was aware,[10] counsel for U.S. Bank assumed the communication may have been a ruse. Regardless, the Court finds U.S. Bank had implied actual notice of the filing "which is said to include notice inferred from the fact that the person had means of knowledge, which it was his duty to use and which he did not use . . . ." *Sapp v. Warner*, 141 So. 124, 127, *adhered to on reh'g*, 143 So. 648 (Fla. 1932).

> The principle applied in cases of alleged implied actual notice is that a person has no right to shut his eyes or ears to avoid information, and then say that he has no notice; that it will not suffice the law to remain willfully ignorant of a thing readily ascertainable by whatever party puts him on inquiry, when the means of knowledge is at hand.

Id. at 255. Here, U.S. Bank could easily have verified whether the Debtor had filed a bankruptcy case as he claimed, but it did not. This factor weighs against annulling the stay.

2. The Debtor filed this case in bad faith.

The Debtor filed this Chapter 7 case for only one purpose—to buy time while his appeal of the Foreclosure Judgment is pending. This is evident from his Statement of Intention which reveals his belief that he will retain, or otherwise be awarded the Property, after a ruling in his favor by the Fifth District Court of Appeal. However, he quitclaimed his interests in the Property

[10] U.S. Bank recounts the Debtor's actions in State Court, which include several changes of counsel, motions to disqualify the judge, motions to show cause, and an earlier appeal, among other things. (Doc. No. 43 at 3 n.1.)

long ago and has not made any payments on the mortgage in over thirteen years. As U.S. Bank states, the Debtor filed this bankruptcy case "to stop a foreclosure sale on property that he no longer owns nor lives in . . . ." (Doc. No. 43 at 5.) He has not come to this Court in good faith and has no legal interest in the Property to protect. This factor weighs in favor of annulling the stay.

3. Grounds existed to lift the automatic stay if requested prior to the Foreclosure Sale.

For many reasons, sufficient grounds exist to merit lifting the stay to permit the Foreclosure Sale to go forward had such been requested before it occurred. Pursuant to 11 U.S.C. § 362(d)(1) the stay can be lifted for "cause" including a lack of adequate protection. The stay can also be lifted if the debtor lacks equity in the property, and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Here, the Debtor has no equity in the Property because he transferred the Property to his daughter, who then transferred it to Watson.

Further, he did not file this case seeking to reorganize the debt encumbering the Property and has not made a payment on the mortgage in over thirteen years, much less offered U.S. Bank any adequate protection; quite the opposite, U.S. Bank has advanced $173,000 in escrow costs on the Debtor's behalf. (Doc. No. 43-2 at 3 ¶ g.) And whatever equitable interest the Debtor *may* have had to redeem the Property is far too attenuated on these facts to merit protection of the automatic stay. *See generally In re Geris*, 973 F.2d 318, 320-21 (4th Cir. 1992) (holding that automatic stay does not prevent foreclosure of property not owned by debtor, even though the debtor is liable for the indebtedness secured by the property); *In re Everchanged, Inc.*, 230 B.R. 891, 894-95 (Bankr. S.D. Ga. 1999) (finding that foreclosure sale did not violate automatic stay where title to the property securing the mortgage was titled in an entity other than the debtor

when the sale occurred and when the petition for bankruptcy was filed, despite debtor's continuing liability for repayment of the mortgage); *In re JR Mortgs., Inc.*, No. 11-14876-BKC-AJC, 2011 WL 6097131, at *3 (Bankr. S.D. Fla. Dec. 6, 2011) (finding that no stay was in effect when foreclosure sale occurred because the property was not property of the estate where the debtor did not own the property when the petition was filed); *In re McLouth*, 257 B.R. 316, 322 (Bankr. D. Mont. 2000) (finding that stay was not in effect when property pledged as security was sold hours before the debtor's bankruptcy petition was filed). As such, U.S. Bank has met its burden of demonstrating grounds existed to lift the automatic stay had the request been made prior to the Foreclosure Sale. This factor weighs in favor of annulling the stay.

4. Denying retroactive relief would result in some unnecessary expense to U.S. Bank.

U.S. Bank argues that it will incur additional costs it will not recover and may lose the buyer from the Foreclosure Sale if the Court does not validate the sale to Surna. (Doc. No. 43 at 6.) Although U.S. Bank does not enumerate these costs, it is worth repeating that it advanced $173,000 in escrow and that the Foreclosure Sale resulted in a sale price of $685,000, but the Final Judgment is for $1,575,383.25. Thus, there appears to be little chance U.S. Bank could recover its expenses in re-selling the Property if the Court declines to annul the stay and validate the sale. This factor is not the most significant concern here, but in this unusual case it weighs in favor of annulling the stay.

5. U.S. Bank did not detrimentally change its position.

U.S. Bank concedes that "[o]ther than being forced to participate in a bad-faith bankruptcy, thus incurring additional costs, [it] has not detrimentally changed its position." (Doc. No. 43 at 6.) This factor is only a minor consideration under the facts and does not weigh heavily in favor of annulling the stay.

6. The Debtor has no equity in the Property.

As stated above, the Debtor has no equity in the Property due to quitclaiming his interests in the Property to his daughter long ago and this deed, and the subsequent deed to Rembert, were recorded. (Doc. No. 43-7.) Because of this, valuation of the Property is not relevant, and there was no testimony or other information taken into evidence establishing the Property's value. However, the Foreclosure Judgment establishes the debt encumbering the Property at $1,575,383.25 (Doc. No. 43-2 at 5), and Surna purchased the Property for $685,000 (Doc. No. 43-4), which is at least some indicia of the Property's value. In addition, the assessed value (which is typically lower than the amount a property may sell for in the open market) is $752,546. (Doc. No. 43-8.) Even in the recent "seller's market" the Debtor appears significantly upside down in the Property. As such, this factor weighs in favor of annulling the stay.

7. The Property is not necessary to an effective reorganization.

The Debtor did not file this Chapter 7 case to reorganize and, having no regular income, he would not be eligible to reorganize in a Chapter 13 case. *See* 11 U.S.C. §§ 109(e), 101(30). As stated above, the Debtor filed this Chapter 7 case for only one purpose—to buy time while his appeal of the Foreclosure Judgment is pending. This is not a proper use of Title 11. This factor weighs in favor of annulling the stay.

8. U.S. Bank promptly sought to lift the stay retroactively to obtain approval of the Foreclosure Sale.

The Debtor filed this case on March 25, 2022 (Doc. No. 37 at 11) and filed an emergency motion to vacate the Foreclosure Sale a few days later (Doc. No. 8). On April 15, 2022, U.S. Bank filed an opposition and included a request that the sale be validated nunc pro tunc. (Doc. No. 28.) A hearing was held at which it was determined that U.S. Bank would file a motion to annul the automatic stay (Doc. No. 33), which U.S. Bank did on May 12, 2022 (Doc. No. 43).

On the facts of this case, the Court finds U.S. Bank acted promptly to seek annulment of the stay to permit the Foreclosure Sale to be validated. This factor weighs in favor of annulling the stay.

9. The third-party purchaser's rights will be impacted if the stay is not annulled.

Surna did not attend the hearing in this case, so there was no testimony or other evidence about the impact upon its rights if the stay is not annulled. The Court can only take judicial notice of the State Court docket which reflects that Surna deposited the purchase price and clerk's fee into the registry. (Doc. No. 43-6 at 2.) At a minimum, Surna has been deprived of the benefit of its bargain and the use of its funds while this case has been pending. This factor weighs in favor of annulling the stay.

After reviewing the factors regarding whether the stay should be annulled, the Court finds that U.S. Bank met its burden of demonstrating that annulment is proper.[11] Although U.S. Bank had implied actual notice of the bankruptcy and it did not detrimentally change its position in reliance on the sale, most of the factors weigh significantly in favor of annulling the stay. The Debtor filed this bankruptcy in bad faith, the stay would have been lifted if requested before the Foreclosure Sale, the Debtor has no equity in the Property, the Property is not necessary to an effective reorganization, U.S. Bank acted promptly to annul the stay, and Surna's rights will be impacted if the stay is not annulled. The Debtor has not met his ultimate burden of proving that the request for retroactive relief from the stay should be denied. Moreover, the Debtor's case is due to be dismissed for failure to obtain prepetition credit counseling, as discussed below.

[11] Pursuant to 11 U.S.C. § 362(g), "the creditor seeking retroactive relief must first show the presence of circumstances warranting annulment of the stay, and the debtor then bears the ultimate burden of proving that the request for retroactive relief from the stay should be denied." *In re Barr*, 318 B.R. 592, 598-99 (Bankr. M.D. Fla. 2004).

B. Can the credit counseling class requirement be waived in this case?

The Debtor asks that the Court excuse him from the credit counseling requirement claiming that he does not have access to credit counseling in prison, and that he doesn't need such counseling because he has a sophisticated understanding of financial matters and has taught financial management matters while incarcerated. (Doc. No. 40.) At the hearing, the Debtor said none of the vendors he contacted would provide him with credit counseling telephonically while he was in prison, although he could not recall the names any of the vendors he contacted at the hearing. (Doc. No. 62 at 6, 7.)

Under 11 U.S.C. § 109(h)(1),

> an individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

"An individual may not be a debtor in bankruptcy court unless that individual has received credit counseling from a nonprofit budget and credit counseling agency." *In re Sussman*, 816 F. App'x 410, 415 (11th Cir. 2020) (citing 11 U.S.C. § 109(h)(1)). However, there are some limited exceptions to the rule. Credit counseling is not required

> with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements *because of incapacity, disability, or active military duty in a military combat zone*. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

11 U.S.C. § 109(h)(4) (emphasis added).

The Debtor is not incapacitated or disabled. The Debtor is not on active duty in a military combat zone. And imprisonment does not constitute "exigent circumstances" meriting waiver of the credit counseling requirement. *In re Oliver*, No. 12-30468, 2013 WL 1403336, at *2 (Bankr. S.D. Ga. Mar. 25, 2013) ("[I]ncarceration does not excuse a debtor from the § 109(h)(1) credit counseling requirement."); *In re Patasnik*, 425 B.R. 916, 917 (Bankr. S.D. Fla. 2010) ("[T]he overwhelming majority of courts have held that incarceration does not excuse a debtor from the § 109(h)(1) credit counseling requirement."); *see also In re Hobbs*, No. 12-50098, 2015 WL 1805989, at *1 (Bankr. S.D. Ga. Apr. 16, 2015) (declining to waive requirement to complete personal finance course for discharge, stating that imprisonment does not qualify as a disability). Therefore, the Debtor's request for waiver of the credit counseling requirement is denied.

Because the Court declines to waive the credit counseling requirement, this case will be dismissed. *In re Booth,* No. 05–45002, 2005 WL 3434776, *2 (Bankr. N.D. Fla. Oct. 19, 2005); *In re Bulger*, No. 21-31333-BPC, 2022 WL 348627, at *3 (Bankr. M.D. Ala. Feb. 4, 2022) ("Failure to complete prepetition counseling renders one ineligible to be a debtor and demands dismissal.") citing *In re Wood*, 2013 WL 1969303, at *1 (Bankr. S.D. Ga. May 13, 2013) (finding debtor ineligible based on failure to receive pre-petition counseling and dismissing case); *In re Coley*, 2009 WL 2030435, at *1 (Bankr. M.D. Ala. July 6, 2009) ("The [§ 109(h)] requirement is mandatory, and the case must be dismissed.")

C. Rembert's Objection

The final matter before the Court is Rembert's Objection. (Doc. No. 54.) In Rembert's Objection, she states that she "objects to Debtor's Bankruptcy proceedings in reference to the removal of debt incurred by Debtor for work accomplished by Rembert against the asset of the

[P]roperty . . . .” (*Id.*) At the hearing, Rembert stated that she owns the Property, invested over $200,000 in it, and is living there. (Doc. No. 62 at 8, 9.) Although not clear, it appears that by filing the Objection, Rembert is attempting to preserve claims she may have against the Debtor for work she did regarding the Property. Because it is unclear what relief Rembert is seeking, the Objection is overruled, but without prejudice to any claims Rembert may seek against the Debtor in another forum following the dismissal of this case.

III. CONCLUSION

Because the Debtor did not own the Property when he filed his petition for bankruptcy, the Property was never a part of the estate and was not subject to the automatic stay under 11 U.S.C. § 362(a). If the Debtor had a right of redemption subject to the automatic stay, U.S. Bank met its burden of demonstrating that annulment of the stay is appropriate, and the Debtor failed to meet his ultimate burden of proving that the request for retroactive relief from the stay should be denied. In addition, the Debtor is not excused from completing a credit counseling course. Finally, Rembert’s objection is overruled without prejudice.

Accordingly, it is **ORDERED** as follows:

1. Debtor’s “Emergency Motion to Vacate Foreclosure Sale” (Doc. No. 8) is **DENIED.**
2. Debtor’s “Amended Motion to Void Foreclosure Sale” (Doc. No. 37) is **DENIED.**
3. Debtor’s motion to excuse credit counseling class (Doc. No. 40) is **DENIED.**
4. U.S. Bank’s motion to validate the Foreclosure Sale nunc pro tunc, or in the alternative, relief from the automatic stay (Doc. No. 43) is **GRANTED**. The automatic stay shall be annulled pursuant to 11 U.S.C. § 362(d)(1).
5. Debtor’s “Motion in Opposition to Annulment of Automatic Stay” (Doc. No. 51) is **DENIED**.

6. Rembert's "Objection to debtor's Bankruptcy Proceedings" (Doc. No. 54) is **OVERRULED** without prejudice as to any claims she may have against the Debtor.

7. The Clerk is directed to dismiss this case.

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The Clerk is directed to serve a copy of this order on all interested parties.